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SUBJECT: BRAZILIAN JUDGE OPENS NEW EXCEPTION TO ABORTION BAN

11. (SBU) SUMMARY. On July 1, a judge on the Brazilian Supreme Federal Court issued a temporary ruling allowing pregnant women whose fetuses suffer from anencephaly (not having a brain) to undergo an abortion. This ruling is now in force, but to become permanent it must be approved by the full Court. Brazil is the world's largest Catholic country, and Church leaders have criticized the ruling and are studying ways to challenge it. The decision creates only the third legal exception to Brazil's abortion ban (threat to the life of the mother and pregnancy resulting from rape being the others). Despite being illegal, abortion is common here and one study reported that 31% of Brazilian pregnancies end in abortion. Thus the most likely long-term outcome of the debate is that the abortion ban will remain largely in place --with certain exceptions-- and will continue to be widely flouted. END SUMMARY

ABORTION BAN HAS TWO EXCEPTIONS

12. (U) The Brazilian penal code, dating to 1940, bans abortion as a crime punishable by up to three years' imprisonment for the health provider and the mother. There are two exceptions: when the pregnancy results from rape or in order to save the mother's life. Prosecutions are rare and international organizations estimate there are from 1.4 to 3 million illegal abortions per year in Brazil. A 1996 report estimated that 31% of Brazilian pregnancies end in abortion and that the majority of women seeking abortions are married. While the law specifies no such exception, since 1991 individual Brazilian judges have authorized an estimated 350 abortions in cases of anencephaly. None of these rulings has been challenged to the high court.

CURRENT CASE - LIMITED TO ANENCEPHALICS

13. (U) In the current case, the National Confederation of Health Workers (CNTS -an association of a million physicians and nurses) filed the petition with the high court in order to obtain greater legal security when treating anencephalic cases. CNTS's petition pointed out that because anencephalic fetuses are not viable outside the womb, the procedure would not be abortion but rather "anticipating the birth". In his ruling, Supreme Court Judge Marco Aurelio de Mello agreed, noting that forcing a woman to carry a fetus that could not survive imposed undue psychological harm and medical risk, violating her constitutional rights to dignity, choice and health. His temporary ruling applies to all anencephaly cases nationwide until the full court can hear the case when it returns from recess in August. The decision also suspends any ongoing charges against health workers for previous abortions of anencephalics.

14. (SBU) On a parallel track, Senator Duciomar Costa (PTB-Para) has drafted a bill that would specifically make anencephaly the third exception to the abortion ban. That bill is in the Senate's Justice Committee but may not become law for several months, if ever. Costa told us that he drafted the law a few months ago to protect health workers from oppressive prosecutions, but that he is personally opposed to abortion on religious grounds. He has no plans to expand the proposed exception from the narrow case of anencephalic fetuses to a broader exception for unviable fetuses regardless of medical condition. The Senator seemed surprised by the vociferous opposition of the Catholic Church, and said that he will consult with Church leaders and may "rethink the bill or withdraw it altogether".

15. (SBU) Deborah Diniz, Director of the ANIS bioethics NGO in Brasilia, filed an amicus brief on CNTS's behalf. Like Senator Costa, she told us she is focused narrowly on anencephalic cases and has no plans to expand the legal exception to include other medical conditions. She is not aware of any prosecutions of health workers specifically in anencephalic cases. Diniz believes the Supreme Court petition offers a better and quicker resolution of the issue than waiting for legislation to pass Congress.

CATHOLIC CHURCH TO APPEAL

16. (U) The Brazilian Catholic Bishops' Conference (CNBB) opposes the ruling. CNBB Vice President, dom Pedro Scherer, told the press, "This ruling is lamentable, an assault on the lives of anencephalic fetuses... There is the risk that,

little by little, other similar and analogous situations will be seen as permissible for abortion". CNBB President dom Geraldo Majella has contacted the federal Prosecutor-General requesting that he challenge the ruling and also issued a statement saying, "CNBB will exert every effort to invalidate this isolated decision and will struggle for the preservation of the rights of anencephalics, especially the right to be born."

COMMENT - LAWS THAT DON'T TAKE HOLD

17. (SBU) While Brazilians tend to be open-minded, this is the world's largest Catholic country, and the Church not only opposes the ruling, but sees it as potentially the tip of the iceberg in terms of creating more exceptions for a range of medical conditions. But another Supreme Court Justice, Celso de Mello, praised Judge Marco Aurelio's ruling, saying, "The magistrate who imposes absolute religious neutrality to the Brazilian State, cannot subordinate his decisions to principles of moral theology, no matter how worthy." In the long run, both views are likely to win out. Brazilians point out that their books are full of laws that "don't take hold" ("nao pega"), and the abortion ban is one example. The most likely outcome is that, whether or not the entire Supreme Court upholds the ruling, that Brazil's abortion ban will remain largely in place and will continue to be widely flouted.

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